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No. 94-431

IN THE

Supreme Court of the United States

OCTOBER TERM, 1994

JAMES D. RYDER, PETITIONER

v.

THE UNITED STATES OF AMERICA, RESPONDENT

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ARMED FORCES

REPLY BRIEF FOR THE PETITIONER

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ARGUMENT

RESPONDENT HAS FAILED TO ARTICULATE A JUSTIFICATION FOR APPLICATION OF THE *DE FACTO* OFFICER DOCTRINE IN THIS CASE.

Respondent concedes that two of the three judges who heard Petitioner's direct criminal appeal were appointed to their judicial positions in violation of the Appointments Clause of the Constitution. Nonetheless, it argues that the

decision below should be upheld because Petitioner cannot prove that his appeal would have been decided differently if it had been heard by a properly constituted court. Such an approach trivializes the Appointments Clause, since such a showing could almost never be made except in conjunction with other constitutional violations. Moreover, as we demonstrate in Point I below, it is unsupported by any of the cases relied on by the Government, and is inconsistent with the Appointments Clause cases decided by this Court, where it has always been presumed that a violation would have rendered the action of the unconstitutionally appointed officer invalid. In addition, as we argue in Point II, neither military necessity nor the Government's reliance interest justifies the decision of the Court of Military Appeals.

I. The Case Law Relied Upon By Respondent Does Not Support the Application of the De Facto Officer Doctrine.

In its brief, Respondent principally relies on rules and analysis of prospective adjudication developed in *civil* cases to avoid potentially extreme disruption of settled expectations based on reasonable reliance on the then-current understanding of the law. Respondent argues that this case should be treated like others in which this Court has declined to overturn "past" or "prior" acts, or in which the challenge to the validity of an appointment is made in a "collateral attack." Resp. Br. 14–17. However, there is nothing past or collateral about the challenge made here: in a criminal case brought by the United States, Petitioner raised an objection to the use of unconstitutionally-appointed appellate military judges to decide his direct appeal, during the course of that very appeal.

Respondent further argues that this Court's cases permit the application of the *de facto* officer doctrine as a matter of remedy, while apparently conceding that it could not be used

as a matter of choice of law. However, the cases relied on by the Government are largely civil, not criminal, cases, and are readily distinguishable. *Buckley v. Valeo*, 424 U.S. 1, (1976), for example, was a civil suit that sought and obtained prospective declaratory and injunctive relief only; it was never an action to reverse any particular action of the unconstitutionally–constituted Federal Election Commission. Even so, some concern was expressed that granting blanket *de facto* validity to the acts of the Commissioners was inappropriate. *Id.* at 255 (Burger, C.J., concurring in part and dissenting in part). Similarly, in *Northern Pipeline Constr. Co. v. Marathon Pipe Line Co.*, 458 U.S. 50 (1982), the party challenging the authority of the bankruptcy court judges got exactly what it sought––dismissal of the contract and tort claims brought against it in an unconstitutional bankruptcy court. *Id.* at 56–57, 88. There was no suggestion that had those claims already been decided adversely to the objecting party, those decisions would have been allowed to stand.

Respondent also ignores the clear implication in *Griffith v. Kentucky*, 479 U.S. 314 (1987), and *James B. Beam Distilling Co. v. Georgia*, 501 U.S. 529 (1991), that purely prospective adjudication has no place in criminal cases, whatever its validity in civil cases. In *Beam*, Justice Souter, announcing the judgment of the Court, speaking of retroactivity in criminal cases, said that "retroactive application could hardly have been denied the litigant in the law–changing decision itself. A criminal defendant usually seeks one thing only on appeal, the reversal of his conviction; future application would provide little in the way of solace. In this context, without retroactivity at least to the first successful litigant, the incentive to seek review would be diluted if not lost altogether." *Id.* at 537. Because the defect involved in this case relates only to his appeal and not his

conviction, Petitioner is the unusual criminal defendant who seeks something other than the reversal of his conviction. However, Justice Souter's point about pure prospectivity being inappropriate in criminal cases applies with equal force. *Griffith*, strictly speaking, dealt with the concept of selective prospectivity in criminal cases, and found it to be inappropriate. *Griffith*, 479 U.S. at 328; *Beam*, 501 U.S. at 538. However, the clear implication of *Griffith* and *Beam* is that the "new" law announced in a criminal case must be applied to the litigant whose case is before the Court. The Court in *Griffith* indicated that the new rule "is to be applied retroactively to *all* cases . . . pending on direct review or not yet final . . .." *Griffith*, 479 U.S. at 328 (emphasis added). "All cases" must include the case in which the rule is announced. Surely, if selective prospectivity is forbidden in *Griffith*, total or pure prospectivity, as urged by the Government here, is even more improper.

This Court's decision in *Harper v. Virginia Dep't of Taxation*, 113 S. Ct. 2510 (1993), also undermines the decision below. In *Harper*, the Court clearly disapproved the concept of selective prospectivity in civil cases, but permitted Virginia to determine the particular remedy that would be provided to correct the defective scheme of taxation at issue there. *Id.* at 2519–2520. That was appropriate in *Harper*, because there were alternative possible methods to correct the error involved there. Here, however, there are no alternative ways to provide a remedy to Petitioner. Either the requirements of the Appointments Clause are enforced, and he gets a remedy, or those constitutional requirements are not enforced, he gets no remedy, and the Appointments Clause is rendered a nullity.

Respondent suggests that the prohibition on advisory opinions does not apply here because the military courts are

not Article III courts, and hence not limited to deciding cases and controversies. However, our argument based on the inappropriateness of advisory opinions is not grounded solely on the limitations of Article III, but on the more general approach to adjudication that this Court has followed. Indeed, if Respondent is correct, Petitioner would have been better off if the Court of Military Appeals had not declared that the appointments of the two civilian judges were unconstitutional, or if the Government had filed a cross-petition with this Court on the Appointments Clause issue. In either case, if Petitioner had convinced this Court of the point that Respondent now concedes--the illegality of the appointments of the two civilian judges--the prohibition on advisory opinions would admittedly apply, and Petitioner would be entitled to another appeal. Moreover, if Article III is the basis for the differing treatment, state courts, which are not bound by the limitations of Article III, could continue the practice of prospective rulings, yet *Griffith* and *Harper* plainly forbid that.

The clear implication of this Court's cases involving challenges to the appointments of judges is that a constitutional defect in the appointment invalidates the judge's actions with respect to any party who has been affected by the judicial acts of the improperly appointed judge, particularly any party who had raised the issue on direct review of the case. In *Glidden v. Zdanok*, 370 U.S. 530 (1962), Justice Harlan phrased the issue as whether the judgments involved there were "vitiated" by the participation of judges alleged to have been improperly appointed as Article III judges. *Id.* at 533. This suggests that, if the judges were found to have been improperly appointed as Article III judges, the judgments involved would have been of no force or effect. Similarly, in *Freytag v. Comm'r of Internal*

Revenue, 501 U.S. 868 (1991), the alleged Appointments Clause defect in the appointment of the special trial judge of the Tax Court was described as going to "the validity of the Tax Court proceeding that is the basis for this litigation." *Id.* at 879. Thus, if the appointments at issue in *Freytag* had been found to be defective, the proceedings conducted by those judges would have been found to be invalid. This is especially noteworthy because, in contrast to Petitioner, the taxpayer who contested the appointment of the special trial judge of the Tax Court had explicitly consented to have his case heard by that judge. *Id.* at 878. In these cases, as well as *Weiss v. United States*, 114 S. Ct. 752 (1994), the in-depth analysis conducted by the Court to determine the validity of the service of the judges at issue, without applying the *de facto* officer doctrine, is a further indication that a remedy would have been ordered if the judges' service had been found invalid.

Respondent argues that the decision below should be affirmed because there has been no showing of specific prejudice to Petitioner from the participation of the unconstitutionally-appointed civilian judges in the review of his case. Resp. Br. 24. In *Glidden*, however, this factor was specifically considered and rejected as bearing on the resolution of the case. *Glidden*, 370 U.S. at 533. The Court noted that there was no allegation or indication of any actual impact on the cases because of the participation of the challenged judges.

Similarly, Respondent's attempt to equate the decision below to a "harmless error" analysis is incorrect. Resp. Br. 33. Harmless error analysis requires a close look at all the facts and circumstances of the particular case, in the context of the particular proceeding. In this case, the Court of Military Appeals did not even attempt to analyze the possible

impact of the unconstitutional appointments in this case. Pet. App. 2a. It did not do so in the *Carpenter* case, either, in which it first applied the *de facto* officer doctrine to affirm the decision of the Court of Military Review. *United States v. Carpenter*, 37 M.J. 291, 295 (C.M.A.), *petition for cert. filed*, 62 U.S.L.W. 3411 (U.S. Oct. 29, 1993)(No. 93-676). Furthermore, the problem of the defective appointments goes to the very validity of the judgment, as discussed *supra*, so no showing of particular harm is required.

Respondent is correct that the defect in the judicial appointments at issue here is not quite the same as the defect at issue in *Glidden*. Resp. Br. 25-26 n.17. However, the *Glidden* decision specifically mentions Appointments Clause defects as among those that could be raised on appeal even if not raised below, like the Article III tenure and compensation protections specifically at issue there. *Glidden*, 370 U.S. at 536. The plain implication is that, if the issue can be raised on appeal, there must be a remedy if the Petitioner prevails.

In addition, it is not correct to conclude that Appointments Clause requirements provide no protection to individual litigants. The Appointments Clause is part of the Constitution's structural separation of powers, designed for the protection of the entire republic, *Freytag*, 501 U.S. at 873, which this Court described in *Mistretta v. United States*, 488 U.S. 361, 380 (1989), as "essential to the preservation of liberty." It promotes wise appointments, in part by placing the appointment power at a high level of authority considered to be publicly accountable. Permitting lower level officials to appoint officers diffuses the appointment power too widely. This diffusion of the appointment power increases the likelihood that unwise appointments to office (or, for that matter, removals from office) will escape public notice and political accountability. Proper enforcement of the

requirements of the Appointments Clause should act to benefit everyone, including litigants, by assuring careful consideration of appointees and enhanced scrutiny of appointees and their acts. These rationales are similar to those that underlie the Article III tenure and compensation provisions at issue in *Glidden*; both serve to benefit litigants indirectly by enhancing the integrity, competence, and independence of the judiciary.

II. Neither Military Necessity Nor the Interest in Stability Justifies the Result Below.

Respondent argues that the military setting in which this case arose bears on the resolution of the issue involved, because of the differences between military and civilian life, and the deference traditionally shown to Congressional regulation of military members. Resp. Br. 28–29. This argument has no validity in the particular setting of this case. It is well settled that Congress is not "free to disregard the Constitution when it acts in the area of military affairs." *Rostker v. Goldberg*, 453 U.S. 57, 67 (1981). More particularly, just over a year ago, this Court made it clear that the Appointments Clause applies to the appointments of military judges. *Weiss v. United States*, 114 S. Ct. 752, 757 (1994). There has been absolutely no showing that considerations of military necessity had anything to do with the creation by Congress of the unconstitutional appointment scheme involved here, or the Court of Military Appeals' decision to afford *de facto* validity to the decisions of the improperly constituted Coast Guard Court of Military Review. Thus, deference to Congress or to the Court of Military Appeals in the area of military affairs can play no part in deciding the effect of the unconstitutional appointments at issue here.

Respondent also argues that the interest in stability and order in the military should dictate affirmance of the decision below. Petitioner agrees that order and stability are, in general, desirable goals. However, those goals do not take precedence over specific constitutional mandates, permitting them to be ignored with impunity. Furthermore, the broad goal of promoting order and stability in the military, or in any segment of society for that matter, is best achieved by doing things *correctly*, rather than permitting constitutional errors to go uncorrected. Affording *de facto* validity to the acts of unconstitutionally-appointed judges erodes order, stability, and respect for the clear requirements of the Constitution, which are the foundations upon which the military system rests. Moreover, the interest in military order and discipline has no connection to whether a decision by two civilian judges to sustain a court-martial conviction and sentence should be upheld.

Reliance interests are simply not relevant in determining the relief to which Petitioner is entitled, either. The Government cannot be considered an innocent third party which relied to its detriment on the defective appointments. The Government created the flawed system to begin with, and was aware of the problem when Petitioner's case was decided. Petitioner cannot be said to have "sat on his rights," thereby lulling the Government into a state of reliance, since there is no way that he could have challenged the appointments of civilians to the Coast Guard Court except in the course of his criminal appeal. As for the public, it cannot be seriously contended that members of the Coast Guard, let alone the general public, made decisions or structured their affairs in understandable, but erroneous, reliance on the validity of these judicial appointments.

This is in marked contrast to the cases cited by Respondent to support its reliance argument. These civil

cases generally involved potentially large numbers of litigants; *Northern Pipeline Construction Co. v. Marathon Pipe Line Co.*, 458 U.S. 50 (1982); or large numbers and amounts of financial interests; *Id.*; *Cipriano v. City of Houma*, 395 U.S. 701 (1969); or litigants who could legitimately claim to have been "led astray" in conducting their affairs by erroneous interpretations of the law by courts; *Chevron Oil Co. v. Huson*, 404 U.S. 974 (1971); *England v. Louisiana State Board of Medical Examiners*, 375 U.S. 411 (1964). It is likely that these sorts of equitable concerns are not even proper considerations in determining the relief to be granted in a criminal case. *See American Trucking Assns., Inc. v. Smith*, 496 U.S. 167, 178 (1990)(plurality opinion), and 209 (Stevens, J., dissenting)(Court has declined to give retroactive effect to decisions announcing new rules of law in some civil cases).

Respondent's expressed concern about the disruption that will be caused by "extensive collateral litigation" if Petitioner prevails in this case is speculative at best. Resp. Br. 30–31. The rights of other potential litigants, not before this Court, and not identically situated, cannot be determined in this case, and should not be addressed. Furthermore, this Court has not hesitated to decide issues and grant relief in criminal cases even when the decision has the potential to affect many cases. *See, e.g., Tome v. United States*, 115 S. Ct. 696 (1995)(prior consistent statements admissible, in spite of the normal rule against hearsay, only when made before motive to fabricate arose); *Williamson v. United States*, 114 S. Ct. 2431 (1994)(statements against penal interest exception to the hearsay rule applies only to statements or portions of statements that are actually against declarant's interest and which declarant perceives to be against his or her interest at the time the statement is made); *Batson v. Kentucky*, 476 U.S.

79 (1986)(race-based use of peremptory challenges to jurors violates Fourteenth Amendment). Any collateral litigation that may arise related to the issue involved here can be resolved in the usual manner, by courts deciding individual cases involving real parties represented by counsel, and after the normal adversarial process. Those few defendants like Petitioner will simply have their appeals reheard by a properly appointed Coast Guard Court of Military Review.

If the Government is correct here, it is not clear when, if ever, it would be required to give persons convicted of a crime in the Coast Guard a constitutionally appointed appeals panel. The rationale urged by Respondent and adopted by the Court of Military Appeals would surely apply to any Court of Military Review case decided before *Carpenter*, and probably to any case submitted or argued before then as well. But if the two civilian judges are *de facto* officers for those cases, why do they not continue in that capacity as long as their appointments last? According to the Government, unless a defendant could show actual prejudice from their participation, their rulings cannot be set aside; we can envision almost no case in which the kind of showing suggested by the Government could be made. Thus, not only would the ruling in *Carpenter* not be given the kind of effect required by *Griffith*, but it would have less impact than any of this Court's purely prospective decisions that are now proscribed. No decision of this Court permits that result, and nothing in any case in which any form of prospectivity was allowed would support it, either. Accordingly, the decision below must be reversed, and Petitioner given a new appeal before the Coast Guard Court of Military Review.

One final matter requires clarification. Petitioner in no way concedes the constitutionality of the appointments of the judges of the Coast Guard Court of Military Review by the

Secretary of Transportation, as Respondent suggests in its brief. Resp. Br. 21 n.14. As both Respondent and Petitioner agree, the validity of the Secretary's memorandum of January 15, 1993, is not presented in this case, and cannot be decided by this Court at this time. *Id.*; Pet. Br. 8 n.5. Petitioner seeks remand for a new appeal in the Court of Military Review because that is the stage of his case which suffered from the unconstitutional appointment scheme. Petitioner's request to remand this case to the Court of Military Review for a new hearing of his appeal can only be logically understood as a request for a hearing by the Coast Guard Court only with *constitutionally-appointed* judges. This should clarify any misunderstanding with respect to Petitioner's intent.

CONCLUSION

For the reasons stated, Petitioner prays that this Court reverse the judgment of the Court of Military Appeals, and remand the case for further proceedings.

Respectfully submitted,

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